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IN THE

Supreme Court of the United States

CAYUGA COUNTY SHERIFF DAVID S. GOULD, SENECA COUNTY SHERIFF JACK S. STENBERG, CAYUGA COUNTY DISTRICT ATTORNEY JON E. BUDELMANN, and SENECA COUNTY DISTRICT ATTORNEY RICHARD E. SWINEHART, PETITIONERS

v.

CAYUGA INDIAN NATION OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR NEW YORK

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION, CITIZENS EQUAL RIGHTS ALLIANCE AND CENTRAL NEW YORK FAIR BUSINESS AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the decision of the New York State Court of Appeals effects the governance of the state, affecting the many CERA members who live in New York. Starting with the amicus curiae briefs in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Carcieri v. Salazar*, 129 S. Ct 1058 (2009). CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion requiring the repetition of some facts and adds new facts on how the Nixon Indian Policy was actually implemented. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf, http://www.narf.org/sct/carcieri/merits/cerf_et_al.pdf and www.narf.org/sct/madisoncountyvoneida/cerf_cera_cnyfb_amica_brief.pdf., Docket No. 10-72.

The Central New York Fair Business Association, Inc. (CNYFBA), incorporated in the State of New York, is headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. The holding that the

Cayuga Indian Nation has a "reservation" in New York will adversely affect all citizens of New York by creating potential checkerboard jurisdiction and constant jurisdictional conflict disrupting the justifiable expectations of every person and small businesses.

Members of CERA, further are resident citizens of Seneca and Cayuga Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads; common underground water aquifer; and common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the "reservation" not just the continuing cigarette sales. CERA and CNYFBA are also becoming increasingly concerned with state law not applying to Native Americans. This unequal application of law threatens the very nature of our constitutional government.

Seneca and Cayuga Counties and the Cayuga Indian Nation have consented by letter to the filing of this Amici Brief.[1]

SUMMARY OF THE ARGUMENT

The first section of this brief addresses the land status of the former and present state reservation land in New York including a discussion of the Treaty of Buffalo Creek and its effect. This section explains that the New York State Court of Appeals was incorrect to apply *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463

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[1]Pursuant to Rule 37 of the Court, counsel requested consent for the filing of this brief from the parties more than 10 days prior to its due date. None of the parties authored the brief in whole or in part and no one other than *amici* made a monetary contribution to the preparation or submission of this brief.

(1976) to this former reservation of state land. The section concludes by explaining that the Cayuga did not have any remaining state reservation in 1838 as a result of the Treaty of Buffalo Creek and why lands purchased within the extinguished boundaries of the former reservation cannot meet the definition of a "qualified reservation." The second section discusses federal Indian common law and how the decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) directly interferes with the relinquishment of the United States under the Treaty of Buffalo Creek. It continues with how the "trust relationship" over the Indians as wards becomes a separate basis for interfering with state jurisdiction. This brief concludes by requesting this Court to overrule its prior decisions that allow the Nixon Indian Policy.

ARGUMENT

The New York State Court of Appeals in its 4-3 decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) concluded that as a matter of federal law the Cayuga tribe was acting within its sovereign capacity to sell cigarettes to non-Indians without collecting the state taxes. The highest state court of New York rendered an interpretation of *City of Sherrill* that virtually contradicts this Court's determination that state reservations were created by the Treaty of Fort Schuyler in 1788 before the Constitution of the United States took effect. Like the Second Circuit in the Madison and Oneida Counties' ruling on the collection of property taxes, Docket No. 10-72 before this Court, the New York State Court of Appeals also concluded that even though the former Cayuga reservation had been under the continual

jurisdiction of the state of New York from the Treaty of February 25, 1789 forward, it was somehow a federal "reservation."

The State Court of Appeals concluded that the cigarettes were sold within a "qualified reservation" as defined by Tax Law § 471 by applying federal law to define the land status upon which the two convenience stores selling the cigarettes were located. The Counties attempted to argue against the interpretations of federal Indian common law by alleging the Cayuga reservation was disestablished or diminished as a matter of federal law. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not expressly reach the issue of whether the former state reservations of land are or are not presently federal "Indian country" or are still "reservations."

The State of New York has a history in statute and case law of allowing the Indian tribes recognized by the State to continue to live by their own laws. It was a policy established with the Treaty of Fort Schuyler in 1788 and codified into state law before the Constitution of the United States went into effect. New York has treated the Indians as state citizens and as separate governments. This state policy allowed these tribal governments to continue to apply their own customs to their own unique societies for over 200 years. This respect for the Iroquois Confederacy is noticeable even today in the State Court of Appeals ruling that is the subject of this case.

This continual respect for the Indian cultures has also made New York particularly vulnerable to the

swings in federal Indian policy. During periods of federal benign neglect of the Indians, New York has been left alone to interact with the New York tribes. It has been only when the federal government has decided to advocate for specific tribal interests that the federal government asserts that the Treaty of Canandaigua, 7 Stat. 44, created a continual federal authority over not only the Indian people and tribes but also federal rights in the state reservation lands. There was considerable discussion within the Bureau of Indian Affairs (BIA) Indian Organization Division (IOD) from July 1934 through 1936 whether the New York tribes were even eligible to vote for the Indian Reorganization Act (IRA) of 1934. A last minute decision from Commissioner John Collier allowed all of the New York tribes to vote on the IRA. All of the New York Indian tribes rejected the IRA because they did not want their traditional governments that had been respected by the State of New York to be replaced by the new tribal constitutions written by the BIA IOD.

I. THE INDIAN LAND CONFUSION IN NEW YORK

a. *The State Court of Appeals Decision*

In this case, the New York State Court of Appeals applied *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976) as allowing the state to tax cigarette sales transactions on former Indian reservations. Appendix of Petition for Certiorari (App.) 2a-3a. *Moe* concerns lands diminished from the federal Flathead reservation in Montana. *Moe* should have no application to a state reservation where New York had and has complete civil jurisdiction to tax sales transactions on

these lands that are under exclusive state jurisdiction. The New York State Court of Appeals defers to federal preemption without requiring the Indian tribe or United States to prove that federal preemption applies in the first place. This "deference" is the result of forty years of land claim litigation challenging New York's jurisdiction over the former state reservations.

As the New York State Court of Appeals opined:

> "Whether the convenience stores sit on reservation land presents a critical threshold consideration. Federal law currently precludes a state from collecting cigarette sales taxes on sales by Indians to members of their own tribe or nation only if those sales occur on a reservation or other Indian lands (*see e.g. Moe, supra*, 425 U.S. 463). If the convenience stores are not on parcels entitled to recognition as reservation land, no federal exemption applies to any of the cigarette sales associated with that location, regardless of the status of the customers who purchase the cigarettes. And if all of the transactions are taxable, the lack of a specific calculation or collection methodology that distinguishes between sales to members of the tribe and sales to other consumers is irrelevant and cannot be asserted as a basis to avoid compliance with the general cigarette sales tax statutes that govern the behavior of every other New York cigarette retailer."

(App. 23a-24a)

The Cayuga Indian reservation in New York was created by the State of New York with the Treaty of February 25, 1789. The term "reservation" was used very loosely through the Nineteenth and into the Twentieth Century. Congress was less than meticulous in modifying reservation status because it was assumed that all reservations were temporary set asides of land. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-4 (1998). It was not until the Indian Reorganization Act of 1934 made reservations permanent that it was necessary to have a precise legal term to decide jurisdictional disputes.

> The Nation claims that the convenience store properties are covered by subsection (a) [2] because they are "[l]ands held by an Indian nation or tribe" since the Nation possesses title and they are located within the Nation's aboriginal reservation, which has never been extinguished or disestablished by the Federal government — the only entity with the power to divest property of its reservation status. Thus, the Nation argues that the term "reservation" in subsection (a) refers to property recognized as such by the federal government.

(App. 25a)

This last paragraph is the same argument made by the Oneida Indian Nation in the *City of Sherrill* case. Obviously, the state courts of New York had

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[2] Qualified Reservation. (a) Lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state. Tax Law § 470(16). App. D 124a.

difficulty applying the facts and history from the *City of Sherrill* decision to the slightly different fact pattern required to enforce the state cigarette sales law, Tax Law § 471. The confusion expressed by the New York State Court of Appeals is the best evidence of the ongoing disputes over jurisdiction in New York.

> Although the Nation no longer possessed fee title to any of its aboriginal reservation lands after 1807, under federal law, the absence of a fee interest is not determinative of the issue of reservation status. It is well settled that only Congress has the power to disestablish or diminish a reservation (*see City of Sherrill*, 544 U.S. at 215 n 9). "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise" (*Solem v. Bartlett*, 465 US 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 [1984]). Thus, the fact that the Nation entered into transactions transferring title to its aboriginal reservation property — including the convenience store parcels that were later reacquired — does not resolve the issue of whether the property in question retained its reservation status under federal law.

(App. 29a)

In various federal lawsuits, New York has claimed that the 1838 Treaty of Buffalo Creek disestablished some of the reservations that had been recognized in 1794, including the Cayuga

reservation. But to date that argument has not been credited by the federal courts. As the Second Circuit noted in *Cayuga Indian Nation of N.Y. v Pataki*, "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga" (413 F3d 266, 269 n 2 [2d Cir 2005], *cert denied* 547 U.S. 1126, 126 S. Ct. 2021, 164 L. Ed. 2d 780 [2006]). It appears that every federal court that has examined whether the Cayuga reservation was disestablished or diminished by Congress has answered that question in the negative (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 317 F Supp 2d 128 [ND NY 2004] [1795 and 1807 transfers of land to NY violated Nonintercourse Act and were void ab initio and Congress did not disestablish or diminish Cayuga reservation in Treaty of Buffalo Creek], *action dismissed on other grounds* 390 F Supp 2d 203 [ND NY 2005]; *Cayuga Indian Nation of N.Y. v Cuomo*, 758 F Supp 107 [ND NY 1991] [lands reserved to Cayuga in 1794 Treaty of Canandaigua could only be divested by Congress] and 730 F. Supp. 2d 485 [ND NY 1990] [1795 and 1807 conveyances of land to New York were invalid under Nonintercourse Act and were not approved by Congress in the Treaty of Buffalo Creek], *action dismissed on other grounds sub nom Cayuga Indian Nation of N.Y. v Pataki, supra*, 413 F3d 266).

(App. 29a-30a)

After 40 years of litigation on the various land claims of the New York tribes there are so many lower

court decisions interpreting and misinterpreting facts it is impossible for any case in New York to straighten the confusion out. In this split decision of the Court of Appeals, the majority asks for help to finally resolve the land issues. App. at 30a. Only this Court can finally resolve the land status issues in New York and restore state sovereignty.

b. *The Omitted History of the Treaty of Buffalo Creek*

The *City of Sherrill* decision gives an accurate history of the treaties and federal laws discussed in the prior litigation affecting Indian land status in New York. Research done since the *City of Sherrill* ruling into the Nixon Indian Policy has revealed that material facts were intentionally left out of the tribal and federal applications of the Nonintercourse Act in the Oneida Test Case.[3] See http//:citizensalliance.org Nixon Memorandum. The Oneida Test Case led to the decisions in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) and County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Oneida II) that allowed the Oneida Indian Nation to sue to claim aboriginal rights they contended were violated by New York not complying with the Nonintercourse Act of 1790, 25 U.S.C. § 177. These cases were the basis of all of the land claim cases brought in New York by various Indian tribes including the Cayuga Tribe. These cases are also the basis of the Indian tribes claiming that the

[3] While it is true that the United States Department of Justice was not representing the interests of the Oneida Indian Nation in the Test Case, there are documents that prove the White House hired its own private attorneys to directly assist the Oneida attorneys in the case.

State of New York does not have primary civil jurisdiction over the former state reservations that finally culminated in the *City of Sherrill* decision.

The Nixon Memorandum specifically says that two major facts were omitted in claiming the Nonintercourse Act of 1790 applied to the sales of the state reservation lands in New York. See http//:citizensalliance.org Nixon Memorandum. First, the facts did not include the federal Removal Act of 1830, 4 Stat. 411, and the concomitant fact that the Treaty of Buffalo Creek, 7 Stat. 550, was a Removal Act treaty intended to disestablish whatever federal interest had been created in New York by the Treaty of Canandaigua, 7 Stat. 44. Nixon Memo at 20. The Removal Act was specifically drafted to meet the obligations of the federal government to the states to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi so that state jurisdiction would no longer be impaired in the Eastern states.

The second omitted fact was that the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceded that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act. Nixon Memo at 23. This 1834 act was passed by Congress after Chief Justice Marshall tried to interfere with the Removal Act with his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832).

The term "Indian country" was first defined in the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to refute the assertion of federal jurisdiction over the Cherokee lands created by Chief Justice Marshall in *Worcester v. Georgia*. *See* F. Cohen, Handbook of Federal Indian Law, 29-34. (1982 ed.). Congress and the Executive branch were very conscious of the fact that the federal Indian policy of treating Indians as capable of waging war against the United States was a constant potential interruption of state jurisdiction that could disrupt the everyday living in the states where Indian relations were no longer about Indians potentially making war. Chief Justice Marshall, a true federalist and vociferous opponent of President Andrew Jackson, made the already bad situation of the Eastern Indians worse by trying to combine a war power federal Indian policy begun by President Washington with a general trust responsibility for the Indians to be exercised at the same time. This true example of judicial activism turned federal Indian common law into a weapon against state sovereignty and the Indian people. All of this politics was involved in the making and ratification of the Treaty of Buffalo Creek.

The remaining Indians in New York were promised in the 1830's that they would be given their own land by the federal government if they would leave New York and make their homes in Kansas or Wisconsin. The situation in Kansas did not work out for the New York tribes, including the Cayuga. *See New York Indians v. United States*, 170 U.S. 1, 21 (1898). Many New York bands entered into the Treaty of Buffalo Creek, 7 Stat. 550, to receive their own land. As a matter of federal land law, the Removal Act operated by exchanging the lands where the federal government

was protecting the Indian title in a sovereign state for actual federal territorial lands in the West. Most of these people settled in Wisconsin on federal reservations purchased for them from the Menominee Tribe. Those that remained in New York were told that federal protection of Indian title and their federal ward status would end at the ratification of the Treaty of Buffalo Creek pursuant to the Removal Act and the Trade and Intercourse Act of 1834. Because many different bands of various tribes were involved in the Treaty of Buffalo Creek, amendments were made and Congress ratified the Treaty of Buffalo Creek in 1840. President Martin Van Buren then entered the Proclamation making the Treaty of Buffalo Creek complete. *See New York Indians* at 10, Fn.1, Finding 10.

The Removal Act was written to fulfill the United States relinquishment of "Indian title" to the original colonies that maintained the right of preemption and actual fee title over all of the lands within their borders. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The Removal Act was the act of disestablishment or diminishment of the only interest the federal government claimed to hold: "Indian title." Once "Indian title" was relinquished in a treaty pursuant to the Removal Act, the land pursuant to the 1834 Indian Trade and Intercourse Act ceased to be federal Indian country. The Treaty of Buffalo Creek relinquished all Indian title held by the United States and the Indian tribes in New York based on the Treaty of Canandaigua of 1794. *New York Indians* at 170 U.S. 1, 21. It did not matter that not all of the Indians were removed. Those that remained in New York understood that all federal protection over the state

reservations of land ceased. The Indians also understood as Rev. Stat. § 2114 makes absolutely clear, once a treaty pursuant to the Removal Act was ratified, the United States retained exclusive jurisdiction over the Indians only "at their new residence." Once relinquished by the United States and Congress, "Indian title" was gone forever and cannot be restored. Only by omitting the facts surrounding the Treaty of Buffalo Creek could there be any claim that New York had wrongfully sold the state lands reserved for the Indian tribes.

As explained above, the "Indian title" was expressly relinquished by the United States and all New York Indians with the Treaty of Buffalo Creek. The 1834 Indian Trade and Intercourse Act defined Indian country as applying to land where the United States still held the "Indian title." Once the Indian title was relinquished there were no longer any federal restrictions on alienation over the state reservation. *See United States v. Boylan*, 265 F. 165, 167-8 (2nd Cir. 1920). According to the facts included in the *New York Indians* decision, the Cayuga had already ceded their entire reservation prior to the Treaty of Buffalo Creek. *New York Indians* at 8, Fn 1, Finding 7. The remaining Cayuga were living mostly on the Seneca reservation. The Cayuga were signatories to the Treaty of Buffalo Creek and many removed to Wisconsin. This was required to extinguish any and all claims of Indian title or restrictions against alienation as explained above.

Once Indian land is alienated by act of Congress, even if the Indian tribe reacquires them, the protections of the Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476

U.S. 498, 505-06 (1986). The New York State Court of Appeals was wrong to apply *Moe v. Salish and Kootenai Tribes* to the Cayuga reservation in New York. There is no remaining federal interest in New York to any of the remaining state reservations. From the ratification of the Treaty of Buffalo Creek in1840 forward there was no Cayuga Indian reservation as a matter of federal statute. The Cayuga reservation has not existed for 200 years under state law. Since the reservation does not exist, the fact that the Cayuga acquired parcels in the extinguished reservation does not make those lands a "qualified reservation" under Tax Law § 470(16). Only if federal Indian common law can be applied to overcome the prior statutory law, could a Cayuga Indian reservation be claimed to exist.

II. FEDERAL INDIAN COMMON LAW THREATENS STATE SOVEREIGNTY

a. *The Ruling in Oneida I Challenges the Relinquishment of Indian Title From the Treaty of Buffalo Creek*

This Court concluded in *Oneida* I that the federal right of occupancy or "Indian title" was still vested in the United States for all Indian land. *Oneida* I at 667-70. It even concluded that this doctrine of a federal right of occupancy was absolute and applied to the original colonies as interpreted in *Fletcher v. Peck*, 10 U.S. 87 (1810) and *Worcester v. Georgia*, 31 U.S. 515 (1832). This led to the conclusion that the Oneida Indian Nation had a present right of occupancy over the former state reservation and could sue the State of New York to reassert its sovereign rights. After 30 years of litigation in various federal court actions, this

Court decided in *City of Sherrill* that the doctrine of laches applied to the claims of the OIN to prevent the OIN from rekindling embers of sovereignty that had long ago grown cold but did not expressly overrule any of the prior holdings against the State of New York and Counties. This means that there is still an absolute federal right of occupancy or "Indian title" in the Oneida and other New York tribes as a matter of equity according to *Oneida* I.

Either Indian title was relinquished and extinguished with the Removal Act of 1830 as executed by the Treaty of Buffalo Creek and the Trade and Intercourse Act of 1834 as explained above or Indian title still is held by the United States under *Oneida* I. It cannot be both ways. The Nixon administration was actively involved with attorneys representing tribal interests from 1969-1974. William Veeder was working for the White House and communicating directly with the American Indian Movement (AIM). Other attorneys like Reid Peyton Chambers and Harry Sachse were also representing the White House Indian Policy even though they were not necessarily named on any pleadings. According to archive documents, these lawyers were paid through Congressional appropriations to the Executive Branch. It is difficult to believe that the White House was not directly involved in crafting the presentation of the Oneida Test case to open land claim proceedings in New York in light of the Nixon Memorandum. This would also explain why the United States even after the *City of Sherrill* decision has not changed course in New York and is still trying to restore tribal sovereignty.

The mischief created from this ruling in *Oneida* I is twofold. First, it gave the United States a direct power to overcome the history of the Removal Act to reverse land decisions made 150 years earlier by the President and Congress as explained in the first section of this brief. Second, it allowed the Oneida Indian tribe to have standing as a separate sovereign entity independent of the United States asserting its interests in state and federal court. With the ruling in *Oneida* I this Court gave these IRA created territorial governments their own authority to expand federal Indian common law without having to address the consequences to the Constitutional structure. This single decision made the United States unaccountable for the actions of its wards in hundreds of subsequent court cases challenging local and state governments. This ruling has affected the separation of powers, including federalism.

b. *Allowing the Indians to Continue to be Federal Wards With IRA Created Territorial Governments*

Besides the land status confusion that threatens the sovereignty of the state of New York, the other side of this confusion is the fact that as long as the United States can separate the Indians by race and promote only their interests against the interests of everyone else, the Tribes will disrupt local state governance. The last pages of the Nixon Memorandum present a very threatening scenario to create a permanent separate racial sovereignty that threatens the structure of our Constitution. The Nixon Memorandum is titled "Native Americans: At What level Sovereignty?" The Memorandum was written by

White House counsel after President Nixon was forced to resign because of the Watergate scandal. Because the Nixon White House had very limited central files for various issues, when President Nixon resigned each White House project prepared a memorandum for President Ford. The original Nixon Memorandum is located in the Ford Presidential Library in the files of Leonard Garment, former Chief White House Counsel.

The Nixon Indian Policy used both the existing federal Indian common law that the Indians are wards and the IRA to make an unlimited federal Indian policy that was solely managed by the President. According to the internal documents from the Nixon administration neither the Department of the Interior or the Department of Justice had much involvement with Indian law during the Nixon Presidency. Because the IRA as passed by Congress did adopt Commissioner Collier's concept of creating separate tribal municipal governments, the federal Indian common law decisions of *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) and *United States v. Kagama*, 118 U.S. 375 (1886) incorporating the rationale that Indian tribes were located on entirely separate unsettled territory of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857) are applicable to the policy of the IRA.

Allowing a war powers Indian policy to combine with a general trust responsibility as Chief Justice Marshall designed in the Marshall trilogy to oppose President Andrew Jackson and the Removal policy in the 1830's was a potential threat to state sovereignty that no President abused until President Richard Nixon. But, the Marshall judicial activism was used in the *Dred Scott* decision and at the end of the Civil War

in creating the Indian policy of 1871. *See Scott* at 404 and *Kagama* at 382-5. The war power policy of 1871 deliberately altered the trust relationship to stop treaty making and placed Indians and Indian tribes directly under military authority. Rev. Stat. § 2079 and § 2152. The Indian Policy of 1871 was applied to limit state sovereignty in *United States v. Kagama. Id.* at 382-5. The IRA was originally designed by John Collier to use all of these war powers to carve out completely separate sovereign rights for the Indians. But Congress rejected most of Collier's plan, only passing the very limited IRA.

As explained in previous briefs, the Constitution contains authority for the federal government to establish local municipal governments: the Property Clause, Art. IV, Sec. 3, Cl. 2. The Property Clause expressly sets the authority of the Congress to acquire territorial lands and dispose of the territorial lands of the United States. The Property Clause also allows territorial land to be reserved for federal uses and to establish local governments to prepare the people in those areas for citizenship. *See United States v. Gratiot, et al*, 39 U.S. 526 (1840). As long as the IRA policy was treated as "temporary" to prepare the Indians for full citizenship the policy was constitutional. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 476-81 (1915).

With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the policy of the IRA permanent. Because the Secretary claimed he could define which Indian tribes were "recognized" as a continuing power, the power claimed by President Nixon was unlimited by any constitutional restraints.

As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886) to limit its federal common law interpretation of the Indian trust relationship. President Nixon took his newly declared "Indian trust" power without any act of Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility" as it had previously acknowledged in *United States v. Minnesota*, 305 U.S. 382 (1938), *United States v. McGowan*, 302 U.S. 535 (1938), and *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This Court allowed the Nixon Administration to reinterpret the IRA into a permanent policy to intentionally threaten the constitutional structure and federalism. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974). This virtually unlimited executive power is what the Supreme Court released on the people and State of New York in holding that as a matter of federal Indian common law the Oneida Indian Nation could sue to claim its purported federal rights to its former Indian reservation in *Oneida* I.

III. PRECEDENTS MUST BE OVERRULED TO LIMIT THE NIXON INDIAN POLICY

This Court began placing the Indian trust power back within the structure of the Constitution of the United States with the *City of Sherrill* ruling by specifically rebalancing the equities to limit the jurisdiction of the federal courts to expand the "Indian trust" through federal common law rulings. *Sherrill* at 218-20. This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to restore tribal sovereignty to land that had been under state jurisdiction. *Id.* at 213-4. But *Sherrill* has not resolved the underlying problem of the loss of state jurisdiction. This case is just the beginning of New York State attempting to enforce its tax on cigarettes sold to non-Indians all over the state. This is not only a revenue issue. Cigarette sales are also a traditional health and safety issue under the state's police powers. Many New York tribes have filed suit against the state and its statutes that try to correctly interpret the federal law that has been enforced against New York for forty years of land claim litigation.

The wrongful conclusions that the Nonintercourse Act of 1790 was violated by New York must be corrected to allow New York to enforce taxes against cigarette sales to non-Indians. There is no way to correct the confusion and loss of state sovereignty if this Court is not willing to overrule the prior decisions that released the insidious Nixon Indian policy.

CONCLUSION

The Court should reverse the decision of the New York State Court of Appeals.

Respectfully submitted,

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